



Missouri Department of Natural Resources

Clean Water Commission Water Pollution Control Program

**Meeting by
Conference Call**

January 15, 2003

**Missouri Clean Water Commission Meeting
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Participating:

Clean Water Commission:

Thomas Herrmann, Janice Greene, Art Hegi, Davis Minton, Cosette Kelly, Kristin Perry
Region VII EPA:

Leo Alderman, Carol Kather, Cheryl Crisler, Martha Steincamp

Missouri Department of Natural Resources:

Jim Hull, Becky Shannon, Aimee Davenport, Diane Waidelich

Attorney General's Office:

Deborah Neff

Public:

Robert Brundage

Mr. Hull reported Leslie Holloway of the Missouri Farm Bureau had indicated she would participate from the Jefferson Building but did not arrive.

Mr. Alderman reported Karen Flournoy of Region VII had previously talked to one or more of the commission members at which time the commission's interest in the status of EPA's review of the proposed 303(d) List submitted by Missouri was noted. He stated EPA is about 30 days away from putting its draft decision document on the proposed Missouri list out for public comment. There were a number of waterbodies, at least around 60, for which EPA felt the justification and data was not sufficient to remove those waterbodies from the 303(d) List and the draft decision document reflects putting these waterbodies back on the list. Mr. Alderman noted EPA is looking for any additional data that might support taking these waterbodies off the list or putting them back on.

Commissioner Minton discussed some in the agricultural community being at a competitive advantage in comparison to the rest of the agricultural community because a stream may or may not be on the 303(d) List. He continued that money could be misappropriated because the list is not accurate and asked that EPA be sensitive to the fact that there is a tremendous amount of money hinging on the list. Commissioner Minton noted the commission unanimously supported the list submitted to EPA because they knew there was documentation for those streams to be on the list. It is debatable whether the streams that potentially go back on the list should go on the 303(d) List or the 305(b) Report. Commissioner Minton asked that EPA be sensitive to the cost to the agricultural community, the need for a legitimate list, and the impact of not yet having a list.

Mr. Alderman noted EPA understands this and wants to complete the list as soon as possible but yet complete the most accurate document that reflects the waterbodies in the State of Missouri.

Commissioner Perry asked why EPA is proposing to put the waters back on the list after the Clean Water Commission voted unanimously that there was insufficient, recent data to put those waters on the list.

Ms. Crisler responded there is an existing EPA-approved 303(d) List. Documentation has to be supplied in order for waterbodies to be removed from that approved list. Waterbodies are typically removed from the list after the TMDL has been completed or when there is new data or information to demonstrate that the Water Quality Standards have been exceeded. EPA did not receive the information for the waterbodies in question. If EPA adds waterbodies back, it is because that information was not received to demonstrate that they should be removed from the list.

Commissioner Minton asked what category of pollutant the streams would be put under if the streams are put back on the list.

Ms. Crisler responded EPA would add a waterbody back on the list because it's impaired and it would be identified either for the specific pollutant or identified that it's impaired for whatever cause was noted.

Commissioner Minton stated several of the streams that were delisted were originally on the old list as sediment being the pollutant and now they are referred to as habitat loss. He asked what pollutant will be listed if these waters are added back to the list.

Ms. Crisler responded they will probably be listed for sediment. She continued that when EPA public notices its proposed list, anyone will have an opportunity to comment on waterbodies that EPA adds back. If there is data or information which will demonstrate they should not be added back on, that entity can provide that data or information. Ms. Crisler stated it's not a final decision once EPA issues its decision for public comment.

Responding to Commissioner Kelly's question, Mr. Alderman stated EPA does not intend to hold a public hearing; EPA is soliciting information or data.

Commissioner Minton asked if it would be permissible for the Clean Water Commission to take comments if they held a meeting during EPA's public comment period.

Ms. Steincamp responded those types of things can be submitted for the record. She continued that there must be data to show that something is no longer impaired or that the impairment has gone away. Someone saying a waterbody is not impaired will not have any weight at all; EPA has to have information to create an administrative record with. Ms. Steincamp stated that any suits brought against EPA will be brought based on the administrative record. If the administrative record does not include substantive information, EPA will not be able to sustain its decision.

Chairman Herrmann stated his information shows seven streams that were requested to be delisted for three reasons: listed as an unknown, as an unspecified, or as not specified pollutant. He asked how EPA can put those seven streams back on the list if there is no indicated pollutant that impairs the stream.

Ms. Crisler replied she is not sure if the streams being referenced are being added back. It is reasonable that waterbodies that are known to be impaired can be listed for an unknown pollutant. There will have to be monitoring which demonstrates what the pollutant is before TMDL is actually completed. What is actually the pollutant may not be known under the national approach to putting waterbodies that are impaired on the list.

Chairman Herrmann asked how it can be declared impaired if the pollutant is not known.

Ms. Crisler responded typically the state will add that waterbody to the list and they have some information which has demonstrated that it is impaired or it's based on data or information.

Chairman Herrmann stated the commission was not able to discern that during discussions with the staff.

Ms. Crisler stated she is not certain whether the waterbodies that Chairman Herrmann is concerned about will in fact be added back.

Chairman Herrmann stated he counts 63 deletions.

Mr. Alderman noted he was generalizing with the number he had quoted earlier.

Commissioner Perry noted a problem when a stream is put on the list and it is automatically thought to be impaired. The commission discovered during discussions with staff that they could not see data clearly indicating that these waters had been impaired in the first place because it was unknown, unspecified or that it had been changed from sediment to habitat loss. Commissioner Perry noted it seems we are working against this huge presumption that there has to be data to prove a negative.

Mr. Alderman replied this is the primary reason EPA encourages the states to develop good data by having a good monitoring network before they submit the list. He noted no matter what comes out of this process, the focus at the end needs to be on how to get accurate, good data and it sounds like there are a lot of questions about the accuracy of what came in and the information that is available. Mr. Alderman stated he would like to see EPA, the states, the agricultural community, and the environmentalists come to a consensus on what kind of data is needed and to focus on getting good monitoring data so that these issues will be resolved up front so these discussions won't be needed at the end.

Commissioner Perry asked if that wasn't the Clean Water Commission's job. This was a unanimous decision by the six commissioners that they felt the data was not sufficient on the 63 waters. The discussion says that at some point if data becomes available that says the waters are impaired, the commission will immediately put them back on the list.

Commissioner Greene clarified when she voted it was not because she believed there was insufficient data but rather because DNR said that they had not intended for these streams to be listed on the very first 303(d) List. She noted a separate category to collect more data was established but EPA added all the categories to the list.

Commissioner Minton stated the commission learned two things from the last list that was submitted and approved. The State of Missouri submitted a list that was divided into categories. One of the categories of streams needed further consideration but EPA put all categories together to formulate the 303(d) List. Now the commission has a 303(d) List that they did not authorize. The commission is now responsible for coming up with the data to delist those streams when maybe they can't be delisted because there was no information to list them. Commissioner Minton noted during the public hearing process, the commission found out that approximately 40 of the streams were on the list because it was thought the list didn't appear to be long enough so 40 streams throughout the state were added to make the list more acceptable to certain environmental groups. Commissioner Minton stated streams were added to the list four years ago without the commission's knowledge for which the commission knew there was no information to list them and that they needed closer observation. He continued that there were 40 streams put on the list that the commission would question whether they should have ever been submitted to the EPA in the first place if they were going to get listed on the 303(d) List. The list needs to be truly a list of impaired waters because for the first time there is millions of dollars riding on this list. The commission did not have the information in front of them that these streams should have been put on the list or to take them off. Commissioner Minton stated he hopes EPA will question staff to make sure that the list that goes out has the data to support being on the list in the first place. There were serious questions about 40 of the streams on the previous list.

Mr. Alderman responded EPA has been in continual contact with the state since they received the list to get data and interpreting that data. He continued that he believes EPA has done everything they can to get existing data in to their office before the draft decision document goes out.

Chairman Herrmann asked if a TMDL has to be prepared for those 60 some streams if they are put on the list.

Mr. Alderman replied a TMDL will not necessarily need to be prepared. He noted he should not have used the number in the beginning of this conference call because he does not know the number.

Chairman Herrmann stated he is using his list of deletions.

Ms. Crisler stated before a TMDL is developed there has to be an analysis done by the state to determine the end point. EPA would hope that the state would have certainties about the impairment and about the pollutant before they would develop a TMDL. If, in the process of getting that data, they find that a waterbody is in fact not impaired where there is no pollutant causing the impairment, that waterbody could then be removed.

Chairman Herrmann noted the commission received misinformation from the staff regarding the number of TMDLs that have been prepared. As of December 1, 2003, the DNR web page shows 22 prepared, one of which was a duplicate, so there were 21 prepared. On December 19, 2002 there was another one for a total of 22. On January 10, 2003, the web page says no additional submittals. Chairman Herrmann stated this is one of the reasons why the impairments where the pollutant is unknown, unspecified and not specified requires more data. There is no category listed in 56 stream segments which means that there is apparently insufficient data to list a pollutant.

Commissioner Perry noted these streams were not actually proposed by the State of Missouri to be on the 1998 list but EPA put them on. She asked if the burden of proof should not be on EPA to show that they were in fact impaired for some reason in 1998. Yet now the state is being asked to prove that these waters do not belong on the list when it sounds like they were chosen at random to be added; sworn testimony from the lawsuit says that. Yet EPA is asking the state to prove that these waters do not belong on the list when the state did not say that they belonged on the list in the first place.

Ms. Crisler responded when EPA received the 1998 list from the state, there were three categories. All of those waterbodies were identified by the state as being impaired through the text that accompanied the 303(d) List. The impaired waterbodies were broken up into three categories. One of those categories included waters for which the department needed additional monitoring data before the TMDL is developed. It indicates that the waterbody is impaired. Ms. Crisler stated EPA had no choice but to identify them as an approved 303(d) List because the state said they were impaired. EPA went back to the state and it was confirmed that all of the waterbodies were impaired. They simply had used a different approach for the different categories. EPA did not automatically add those waters; they were identified as impaired by the state.

Commissioner Perry asked what data was used to confirm impairment and was that data sufficient.

Ms. Crisler noted the commission would have to talk to DNR about that.

Mr. Hull noted both he and Ms. Shannon were not in their present positions at that time so they may not be able to respond to that.

Commissioner Perry noted it seems to have been brought to the commission's attention now that the data used for the 1998 303(d) List was not sufficient.

Ms. Neff stated she was with the commission during the adoption of the 1998 303(d) List and the commission specifically only identified category 1 as its TMDL list and the other categories were identified as needing more monitoring and data. By the definition of the 303(d) List and its requirements, the only thing that was submitted to EPA as a TMDL list was category 1, yet EPA chose to put all the categories on the 303(d) List. Ms. Neff concluded that is the source of the controversy with the commission because that is not what it voted on as the 303(d) List that it submitted to EPA.

Ms. Steincamp stated she has reviewed the entire administrative record and the operative term is the word impaired. EPA did go back to the state even though there were three categories and one of them said additional monitoring is needed. The state's response was yes we want to do additional monitoring and we have to do that before we can develop a TMDL but we do say the waters in that category are impaired. Once they are deemed impaired by the state, then EPA puts them on the list.

Ms. Neff responded the Clean Water Commission is the chief water contaminant agency for the State of Missouri and it did not say that those other waterbodies were impaired; only category 1. This was not taken back to the commission at the time. Staff was conferred with but the issue was not taken back to the commission and the other waterbodies were never voted on by the commission.

Commissioner Minton noted if the commission would have known the course that EPA was going to take they might not have submitted categories 2 and 3. Once EPA added them to the list, the state is handed the laborious task of trying to get them off the list. Commissioner Minton stated if he had known in 1998 what he knows now, he would never have voted to send category 2 and 3 to the EPA. If EPA had gone to the state and asked staff for anything listed in the 305(b) Report that would indicate impairment that should be brought to the 303(d) List, staff could have responded and hopefully brought back to the commission. Commissioner Minton noted he hopes EPA understands the concerns of the commission between now and when the list is public noticed. The commission did not list categories 2 and 3 as impaired in 1998 so it is their responsibility to delist them. Now that Missouri is required to promulgate a rule for the methodology and 303(d) List, they can find out whether or not they should have been on the list. Commissioner Minton noted he would like to have the opportunity to review it before EPA lists it that way.

Commissioner Perry stated it seems there is a statutory responsibility for the commission to make this determination and the commission was not a part of the process where the waterbodies were actually added to the list. The commission takes another look and votes that they should not be on the list and again the commission's desires and right to make that decision seems to be ignored.

Chairman Herrmann noted the 305(b) Report exists to list those streams that need further study. From discussions, the commission did not delete any of those from the 305(b) Report but rather the commission determined that they would remain there if they were deleted from the 303(d) List. Chairman Herrmann stated that is where they belong rather than on the 303(d) List.

Commissioner Hegi stated he sincerely believes about any waterbody in the State of Missouri can be classified as impaired depending on where and when a sample is taken. To think that drinking water standards can be maintained in these waterbodies at all times is beyond his comprehension. Commissioner Hegi noted he has seen absolutely nothing to indicate that TMDLs are going to solve any problems.

Commissioner Perry stated at the time this list was approved, the commission thought if a list was submitted that they could all live with, staff could concentrate on some more positive issues such as watershed coordination and better monitoring to produce better lists in the future. If those waterbodies the commission said should not be on the list are added back on, a lot of staff time will be taken up proving that they should not have been on the list in the first place, rather than concentrating on actually cleaning up the environment in the state and coming up with better programs to monitor and better watershed coordination from grassroots all the way up through the various state agencies which would have been a more positive approach. Commissioner Perry noted she believes the commission really considered this when voting on this issue.

Mr. Brundage noted Ms. Crisler had stated that EPA had no choice but to list the streams that Missouri allegedly said were impaired on the 1998 list even in the absence of any data, and now EPA says they won't take these off the list without hard proof which is a double standard. Ms. Crisler stated the commission would have to talk to staff about what kind of data was submitted to EPA. Mr. Brundage noted EPA just like they are doing today is looking at the data to help support the 2002 list. He asked if EPA didn't look at the data to support the list in 1998. He asked where the administrative record is for 1998 to support listing of those streams. Mr. Brundage noted EPA says they have been working with staff for the last 60 days to get more data. He asked if this is data the commission is not aware of.

Mr. Alderman responded EPA got information from the state in various formats so what EPA was doing was going from hard copy to computer copy and getting clarification of a lot of that information. The state was not generating new information.

Commissioner Perry stated this process seems to be circumventing the obligation of the Clean Water Commission. She asked if the commission is just window dressing and this is really between EPA and the department.

Ms. Steincamp responded this call is being held today to get as much input as possible from different viewpoints. Traditionally, the DNR will work with the Clean Water Commission and then EPA works with the DNR staff.

Mr. Hull asked if the additional information that was requested of staff by EPA was just clarification of information already submitted to EPA.

Ms. Shannon responded it was.

Commissioner Perry asked where the information is and what the source of the information was that says that these waters should have been placed on the 1998 303(d) List. She continued if DNR did not send that, on what basis did EPA add those waters so that now staff has to negate this. It's causing a tremendous problem with this list although there is some information that clearly indicates that 40 of them were arbitrarily selected such as the statements: He just made them up; He said pick them and pick them below hog confinement places.

Mr. Hull said it's difficult for he or Becky to respond to that since neither was involved at that time. Possibly some staff person would know the answer.

Chairman Herrmann noted he could refer to the statement John Madras made during the public hearing.

Deborah Neff responded John Madras is the person at the time who had more detailed information than the person who gave that initial deposition. John Ford gave the initial deposition and was physically putting the list together. Ms. Neff noted she believes John Madras addressed the issue during some public statements to the commission.

Commissioner Hegi noted he remembers they were told to add every other stream particularly below the hog operations because they didn't feel that EPA would accept the shorter list. He noted he has grave doubts as to whether DNR is not getting close to the same situation that Springfield is having with the Department of Public Safety as far as information. A lot of it is just knowing what somebody wants us to know and trying to come up with something to keep their job.

Commissioner Greene noted the commission wants to know what data EPA received to put those category 2 streams on the original list. The commission voted that technically those weren't going to be on the list. Did EPA have data to list them as an impaired water? Another issue appears to be internal discontent with how the situation has been handled. Commissioner Greene noted the commission needs to be addressing the issue of what information EPA had to put the streams on initially and was that enough to put them on when the commission said it wasn't. The other aspect needs to be discussed at a commission meeting because it is an internal function of the commission.

Mr. Alderman responded EPA did not use their data to put streams on the 1998 list but relied on the state to provide the data and support to put waterbodies on the list. It was the state that said these waterbodies belong on the list. DNR was the lead agency to propose to EPA what they wanted to put on the list. The list that came out in 98-99 contained the waterbodies that the state told EPA were impaired. EPA relied on the state and its data to do that. EPA is doing the same thing for the 2002 list but the decision has to be based on whether the data is sufficient enough to be able to make a change in the status of the list.

Commissioner Greene noted the commission said data was not sufficient to include the category 2 streams on the 1998 list but the data was sent to EPA who decided that it was sufficient to include those streams.

Mr. Alderman replied EPA does not know what happened between DNR and the commission. The state submitted a list to EPA and they relied on the accuracy of this information.

Commissioner Greene stated the original submittal to EPA said category 1 was to be on the 1998 303(d) List. Category 2 is what more information is needed on. She asked if EPA had enough information to declare the waters on the category 2 list impaired even though the state said these waters need to be placed in a separate category because more information was needed.

Mr. Alderman replied EPA did not have to interpret anything. The state told EPA specifically that all these waterbodies were impaired.

Commissioner Kelly noted she was on the commission in 1998. When the commission submitted the list it was not intended that they all be lumped into one list but that is what happened.

Commissioner Greene noted if DNR told EPA that all the waters were impaired and the commission just broke them into categories, that was not the intent of the commission. The problem is back with DNR in that what the commission decided was miscommunicated. Commissioner Greene stated the whole problem stems from the 1998 list. The commission is concerned that they never indicated they were impaired; they said they needed more data.

Commissioner Kelly noted the commission voted to categorize the list in 1998 and surely that was communicated to EPA. She understood that EPA said this couldn't be done.

Commissioner Minton stated the argument is over the accuracy of the 1998 list. The commission was led to believe that the list was submitted to EPA as directed by the commission and EPA used its discretion to combine the categories into one list. Commissioner Minton continued he has never heard that staff authorized or supported EPA in this decision. He noted he has always felt the 1998 list was EPA's list and not DNR's. The

commission never was told that this was a cooperative effort to make the list look like it is today. If it did take place, the commission will have to figure out how to delist the waters. If it was an EPA decision to put these streams on the list when the commission did not believe there was sufficient information to do that, then why should the state be obligated to figure out how to remove them? Commissioner Minton stated a public notice is needed of the list broken down like it was in 1998, at the very least, as opposed to the list that is visualized for 2002. He noted possibly EPA needs to review how the list was formulated to find out where the discrepancy is.

Commissioner Perry noted the commission's concern is that this will happen again and this is what the commission is trying to correct.

Chairman Herrmann noted the commission accepted from staff that federal regulation would dictate four categories which did not become fact until July 1, 2001. The commission's submittal of the four categories was based on the assumption that this was going to be in place. When EPA received the submittal, they lumped the four categories into one list because EPA said the commission couldn't do that since it wasn't federal law yet.

Commissioner Perry noted the commission is trying to fix this and is being asked to prove something that was not intended to begin with.

Mr. Alderman stated EPA could work with the state on initiating a focus on some targeted monitoring and obtain scientific data that will support either the streams being on or off the list. He encouraged going in this direction which he thought could be accomplished fairly soon.

Commissioner Perry noted the list submitted to EPA does not include those waters. She asked if some monitoring could be done before they are added to the list.

Mr. Alderman asked if monitoring could be done for these waters.

Mr. Hull responded not within the timeframe being discussed.

Ms. Neff asked if the department and EPA could agree that until such time as there is sufficient data on the waterbodies in question, a TMDL can't be written.

Commissioner Minton stated the federal farm program is now addressing 303(d) watersheds and priority points are given to those who fall within those watersheds. It is almost impossible for someone outside the watershed to compete for money making a huge economic impact for being on the list.

Commissioner Perry noted the problem is that there is nothing to indicate that there is some hard, scientific data that these streams ever belonged on the list and that is why the commission believes they should not be included on the list now.

Commissioner Minton noted the 1998 list gets carried forward to the 2002 list and the question becomes does the commission carte blanche once again approve the 1998 list all over again. He concluded the commission probably would have taken a course of action in 1998 that would have circumvented this whole discussion in 2002.

Chairman Herrmann noted if a water is listed in the 305(b) Report, the water may be impaired but further study is needed to prove this. He stated that is where the water belongs; not on the 303(d) List where it says by federal regulation that it is impaired by one or more pollutants.

Commissioner Minton stated EPA needs to review its administrative record to determine if information was received from the Department of Natural Resources to allow them to do what they did with the 1998 list. If data was provided by the state in 1998 to allow them to take the course of action they did, he would like to see it.

Commissioner Perry noted that data was not provided in 2002 either and that is why the waters were removed.

Commissioner Minton noted the commission has never seen information that caused those waters to be listed on the 303(d) List. He continued he's not saying the data does not exist but the commission has never seen it and this list was imposed on the commission rather than the commission developing it. There was a failure or lack of communication and that is where the problem lies.

Responding to Commissioner Perry's question, Commissioner Minton noted it is not a disadvantage at all to be on the list. If you are willing to do a practice that will impact the waters in the watershed, you get 10 points. There's a huge advantage to being listed but, if you are on the list without cause, there will be millions of dollars awarded that is not justified.

Mr. Alderman noted this may not make a difference on how NRCS distributes funds but when the list comes out the state puts a priority on them. If there is a waterbody that is significantly impaired and needs to be addressed, having a priority would be a signal to NRCS that this is where the money should go.

Commissioner Minton stated if you are on the list you are pretty much assured that you will get an EQIP contract.

Commissioner Perry noted she would like to make it clear that if EPA were to leave the 2002 303(d) List as it was submitted by the commission, if the commission became aware of data that indicated that some of those waters belonging on the 305(b) Report were in fact impaired, the commission would be willing to make sure those waters were then put on the 303(d) List.

Commissioner Kelly replied she would be willing although there was some evidence for all waters on the list.

Commissioner Perry noted the sole source of some of the information was data that was over 15 years old.

Commissioner Hegi noted to think that everything was pristine from the time of creation is false.

Chairman Herrmann noted the commission would like to have the data contained in the original 1998 listing of these streams to determine if it was sufficient to include those on the 1998 list. The commission also needs the 305(b) Report.

Commissioner Greene asked that EPA go back to the administrative record for the 1998 list to determine why those streams were added to the 303(d) List.

Commissioner Minton noted in 1998 the commission added three waterbodies to the list and had absolutely no data to support that action. While every one of those waterbodies may be impaired, the commission did that without having data to support that action.

Ms. Neff noted 1998 was the first time the Department of Natural Resources took the 303(d) List to the commission in light of all that was occurring with TMDLs. Prior to that, the list was sent directly to EPA.

Mr. Hull noted he is very frustrated by the issue and does not disagree with furnishing the information requested by the commission. EPA can make the call on whether to review the administrative record from that time. Mr. Hull noted the statement about being guaranteed funds if you are on the 303(d) List may not be accurate.

Ms. Shannon stated that is one of many different factors that are taken into account. The most recent ranking counted public drinking water supply as being an equivalent factor to the 303(d) List.

Commissioner Minton noted it is a very competitive process with a whole multitude of things that can be done to get points. It's very difficult to overcome the number of points allocated to be on the 303(d) List. It puts you at a competitive advantage or disadvantage to be on or off.

Ms. Shannon noted she believes there is an opportunity to talk to NRCS about this if it's an inappropriate ranking to use within the context of the State Technical Committee.

Chairman Herrmann asked that staff provide the information for the 1998 list and a copy of the 305(b) Report so it can be reviewed before the January 29 commission meeting. The commission will have time to review this since EPA will not issue the draft final list for 30-60 days.

Ms. Shannon replied the information can be sent in the next few days but the 305(b) Report is partly narrative but there is also a diskette of raw data. She asked if that information is needed also.

Chairman Herrmann asked for only the narrative portion.

Commissioner Perry asked if review of that data would affect EPA's decision whether to take the list as submitted by the commission.

Ms. Crisler responded if there is data or information that demonstrates the addition of some of those waterbodies that EPA adds to the proposed list put out for public comment is correct or incorrect, that could clearly affect the final decision that EPA makes.

Commissioner Greene asked if this is information to delist.

Ms. Steincamp noted if that information is found, that would be the information that EPA would consider for delisting.

Commissioner Perry asked if that information could be the information that there was insufficient data to put it on the list.

Ms. Crisler stated there would have to be a discussion of how it's known that the information is insufficient. If a waterbody was listed in error and there is no data, then EPA would need a description of what happened and why it happened.

Commissioner Perry asked if this would partially also be the information that when the list was submitted it was not submitted as an impaired water but rather a category for which the state intended to do more research.

Ms. Crisler asked if the question is whether or not information or data would cause EPA to recategorize a waterbody which is identified as impaired.

Commissioner Perry replied her question was if it was shown that it was never intended to be categorized as an impaired water but actually was in a category that would probably be equivalent to the 305(b) Report, if that information would be sufficient for EPA not to add that to the list submitted by the commission.

Mr. Alderman replied this question relates more to what the original intent of the Clean Water Commission was in 1998.

Commissioner Perry replied at that time the data did not indicate that those waters should have been impaired and that is the correction that the commission is trying to make on the 2002 list.

Mr. Alderman noted he understands the question to be if the commission and the department went back and looked at those waterbodies and submitted information to EPA showing that it was never intended for those waterbodies to be on the list in 1998, can EPA consider that information and not add them back on during the present process. He continued if there was no data in the first place to put them on the list and the state can show there was no data to warrant putting those streams on the list in the first place, that's where Cheryl was saying yes. The other question that could come up is what if the department says the data may have been insufficient to make that determination. That is where EPA would go back and look at the data and then make a decision.

Ms. Crisler noted EPA would look at the state's own listing methodology to make sure that they did or did not list in accordance with their methodology.

Commissioner Greene noted the commission is asking that EPA makes sure this wasn't done in error. Staff will look at what was submitted to make sure it was submitted the way staff believes it was.

Ms. Steincamp stated in the first instance the state needs to determine what information was used to tell EPA that the waters were impaired.

Ms. Neff replied what may be misleading is that the commission very clearly only submitted category 1 as the 303(d) List. There may have been a question on whether the waterbodies listed in the other categories were impaired. The way the commission understood it was that they may be impaired but there was not sufficient data. EPA may have felt the data was sufficient or they may have talked to staff who said we think they are impaired; we just don't know why. The commission only gave category 1 as the 303(d) List and the others ended up on the list without the commission knowing how it occurred. EPA says it was due to conversations with department staff when clarifying the submittal. It is clear in the commission minutes that category 1 was the 303(d) List. Ms. Neff explained when the

recent submittal was made it was made clear the only thing that was submitted to EPA as the 303(d) List was category 1. This is what the commission is trying to correct and thought they had already done.

Mr. Alderman stated the written correspondence from the state saying that those waters are impaired is part of the administrative record. If the state can come back and provide information and rationale why those should not be on the list, EPA would take another look at that.

Ms. Neff stated staff believed they did that when they submitted the current list.

Commissioner Perry noted a second letter was sent to EPA after the submittal for additional clarification that those 60 some waters should not have been a part of the list.

Ms. Neff noted another thing to consider is that if EPA asked for additional data from the department in 1998 and received it, EPA would be entitled to consider that independently of what the commission did.

Commissioner Minton stated the administrative record would indicate that EPA asked for that additional information and received it.

Commissioner Perry noted the commission is asking EPA to revisit additional information received.

Commissioner Minton noted the commission felt they had done what EPA requested of them and it's like EPA is asking the commission to prove why EPA did what they did. He asked if EPA had the data supplied by staff that allowed EPA to put those waterbodies on the list or was it a judgement call to combine the lists because they interpreted the list as opposed to what the intent was. If there was actually data to support EPA's decision, the commission would not have a problem with that. The commission feels like the process got circumvented.

Ms. Neff asked if the administrative record could be provided electronically.

Ms. Steincamp replied it's multi-volume and it's not on the web site. She will send the indices to Ms. Neff.

Commissioner Perry noted the commission is looking for information where the other categories were added to the list and asked if the lawsuit is not a separate issue.

Ms. Neff stated if the 1998 list came about because of a misunderstanding of what the commission did, then the commission would like to correct that. If the 1998 list came about because of data that existed in 1998, then there is nothing that can be done.

Commissioner Perry noted the commission wants to know what that data is.

Ms. Neff noted this would be in the administrative record.

Commissioner Kelly noted this was never communicated to the commission if that was the reason for EPA adding the waters.

Commissioner Minton stated that is right. If staff had the data when the commission voted on the list the commission would have added them to the list. Clearly staff said they did not have the data to put them on the 303(d) List.

Ms. Neff replied that is exactly how she remembers it and that is in the minutes.

Commissioner Minton stated if staff had the data to include them on the 303(d) List, why wouldn't that have been the recommendation.

Commissioner Kelly stated she thought the commission did submit all of them but as categories.

Ms. Neff said that is what the commission did.

Commissioner Minton noted there was only one category where data was available to support putting them on the 303(d) List.

Commissioner Kelly noted she thought they were on the 303(d) List but under different categories.

Ms. Neff stated the commission was told that category 1 would be the 303(d) List that had the TMDLs and the other categories were things that were being identified to EPA that needed additional monitoring in order to determine whether it would be appropriate to put them on the TMDL list or not. Ms. Neff indicated it might have been submitted to EPA in such a fashion that staff might have said that they thought these are impaired but we just don't know why. The commission intended only category 1 to be the TMDL list and she understood the commission intended this to be the 303(d) List.

Ms. Steincamp noted she will send the indices to Deborah after which she will explain the process EPA went through and the documents they relied on to make their decision.

Commissioner Perry asked if it was possible to have information for the commission at its January 29 meeting.

Mr. Hull noted there is already an agenda item to discuss the 303(d) methodology. Staff will provide the other information the commission requested.

Chairman Herrmann noted the proposed list from EPA might also be necessary to determine which streams EPA is planning to add.

Commissioner Perry noted it would be good to see a justification for the final list.

Ms. Steincamp noted EPA can't share with some and not with others the proposed list that will be put out for public comment. EPA is looking at putting it out for public comment in the next 30 days and EPA is now reviewing the information that has been submitted.

Mr. Hull asked what could be discussed at the commission meeting.

Mr. Alderman noted along the lines of what was discussed today unless the list is out for public comment at that time. He noted they will make every effort to get it public noticed prior to that.

Jim asked if anyone from EPA will be at the commission meeting.

Mr. Alderman responded someone will be there that can speak to the issues.

Mr. Hull informed the commission staff is again working on 401 water quality certifications.

Commissioner Minton asked that water quality certifications be a topic on the commission's January 29 meeting agenda.

Robert Brundage noted he has a copy of the 1998 final 303(d) List and category 2 says category 2 waters are a subset of the waters that are reported as impaired in the 305(b) Report but for which the data is older or of lesser quality than those waters contained in list 1. These waters include those that are impaired from sediment from runoff or channelization, organic enrichment from wastewater or other contaminants. These waters are scheduled for further monitoring. If additional monitoring confirms the impaired condition, full TMDL development would proceed.

Commissioner Perry asked if there was any indication they were being submitted for the 303(d) List.

Mr. Brundage noted EPA said that the commission used the word impaired in the document and they are using impaired as it was used in the 305(b) Report.

Commissioner Perry noted there is no indication that the commission proposed at that time that those 305(b) impaired waters, which were those that were to be studied, were intended to be contained within the 303(d) List.

Chairman Herrmann noted they were but as a category 2.

Mr. Brundage stated the sentence about category 1 waters says category 1 waters are proposed for full TMDL development as indicated in the schedule.

Ms. Neff noted staff followed EPA direction, which was changed, and what staff thought was going to happen was that the whole submittal was the 303(d) List but truly the only thing that was going to require a TMDL was category 1. It was made clear to the commission that these other categories were not going to require a TMDL and staff was saying these need further study.

Mr. Hull asked if the administrative record will clear any of this up.

Ms. Neff responded it should but the point that needs to be made is that the State of Missouri only meant category 1 to be the 303(d) List that requires TMDLs and didn't intend the other categories to be on a list that would require TMDLs.

Mr. Hull asked if someone would have asked staff if waters on the category 2 list were impaired if staff would have said yes.

Ms. Neff responded on some she believes staff would have said yes we think they are impaired but we don't know why and others staff would have said we're not sure without more data. They're on the 305(b) Report and that says they are impaired.

Commissioner Perry asked if that isn't the purpose of having a 305(b) Report.

Ms. Neff responded impaired for 303(d) is different than impaired for 305(b) and we are getting hung up on the word impaired.

Chairman Herrmann asked for a copy of Section 305 of the federal law.

Ms. Neff will provide a copy to the commissioners.

Commissioner Perry asked for an interpretation of the difference between 303 and 305.

Ms. Neff indicated she will attempt to do this.

Conference call was adjourned at approximately 10:35 a.m.

Respectfully submitted,

Jim Hull
Director of Staff